

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**GLORIA GRAHAM**

Claimant

VS.

**GOOCH'S, INC.**

Respondent

AND

**TWIN CITY FIRE INSURANCE CO.**

Insurance Carrier

Docket No. 1,030,678

**ORDER**

Respondent and its insurance carrier request review of the January 9, 2007 preliminary hearing Order For Medical Treatment entered by Administrative Law Judge Pamela J. Fuller.

**ISSUES**

At the January 8, 2007 preliminary hearing, the claimant requested authorized medical treatment and the payment of outstanding medical bills. Respondent denied that claimant provided timely notice of her alleged injury and, in the alternative, argued the medical treatment claimant received was unauthorized.

The Administrative Law Judge (ALJ) determined "[t]hat authorized medical treatment and payment of outstanding medical bills is ordered to be paid by the Respondent and Insurance Carrier on Claimant's behalf until further order, or until certified as having reached maximum medical improvement, whichever comes first." Implicit in the ALJ's Order For Medical Treatment is a preliminary finding the claimant suffered a compensable injury and provided timely notice.

The respondent requests review of whether the claimant met her burden of proof to establish she suffered accidental injury arising out of and in the course of her employment; whether claimant provided timely notice of her accidental injury; and, whether claimant's medical treatment should be considered unauthorized. Respondent argues claimant failed to provide timely notice of her alleged injury and the medical treatment claimant received should be considered unauthorized.

Conversely, claimant argues she provided timely notice and because respondent did not provide her with medical treatment, the claimant sought medical treatment on her own behalf and it should be considered as authorized treatment. Consequently, claimant requests the Board to affirm the ALJ's Order For Medical Treatment.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

The claimant alleged she injured her back at work on July 25, 2006, when, as she picked up a case of soap from a pallet, she turned, twisted and heard her back pop. She loudly exclaimed "ouch" and the respondent's owner, Mr. Dwight Gooch, asked what was wrong. Claimant told him she just heard her back pop.

Claimant finished work that day. At work the next day the claimant told Mr. Gooch her back was still bothering her, that she needed a doctor and was going to the chiropractor. After receiving chiropractic treatment the claimant went home but that evening her pain worsened to the point that she went to the emergency room at Greeley County Hospital. While hospitalized claimant received an epidural steroid injection, analgesic medication as well as physical therapy.

The next day the claimant's husband went to respondent's store and told Mr. Gooch that his wife was in the hospital. Claimant was released from the hospital and received additional epidural injections. Her back and leg pain worsened and she was again hospitalized. When a surgical consult was recommended claimant called Mr. Gooch and told him she needed to know the insurance carrier. Claimant's husband also talked to Mr. Gooch and asked what they needed to do and Mr. Gooch tried to talk Mr. Graham into submitting the claim to his health insurance.

Ultimately, claimant was referred for surgery which was performed on August 18, 2006. A laminectomy foraminotomy and posterolateral interbody fusion was performed on claimant's back at L4-L5.

Mr. Gooch testified that prior to receiving a letter from claimant's attorney on August 16, 2006, he was not aware claimant was alleging a work-related injury. Mr. Gooch denied claimant said she hurt her back lifting the cases of soap. He denied claimant's husband had told him claimant was injured at the store.

The Workers Compensation Act places the burden of proof upon claimant to establish her right to an award of compensation and to prove the conditions on which that

right depends.<sup>1</sup> “Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”<sup>2</sup>

An accidental injury is compensable where the accident arose out of and in the course of employment.<sup>3</sup> The question of whether there has been an accidental injury arising out of and in the course of employment is a question of fact.<sup>4</sup> An injured worker is required to give the employer notice of accident, within 10 days after the date of a work-related accident, or establish just cause for not giving the employer the 10-day notice which extends the notice time period to 75 days.<sup>5</sup>

Where there is conflicting evidence, as in this case, credibility is important. Here, the ALJ had the opportunity to personally observe the claimant and respondent’s owner testify in person. In granting claimant’s request, the ALJ apparently believed claimant’s testimony over the owner’s testimony. This Board Member concludes that some deference may be given to the ALJ’s findings and conclusions because she was able to judge the claimant’s credibility by personally observing the claimant.

Claimant provided notice of her injury to respondent’s owner at the time the accident occurred. And her husband’s second conversation with respondent’s owner seeking information about the insurance carrier responsible for payment of medical was also within 10 days of the accident date. Moreover, two co-workers and another witness impeached respondent’s owner’s testimony that he never had a work-related accident at his business as well as his allegation that he had been told claimant suffered her injury in a fall from a hammock. This Board Member finds claimant has met her burden of proof to establish that she suffered a work-related accidental injury arising out of and in the course of her employment and that she provided timely notice to respondent of that work-related injury. Accordingly, the ALJ’s implicit finding of a compensable work-related injury and timely notice is affirmed.

Respondent next argues that the ALJ erred in ordering payment of medical bills because the medical treatment should be determined to be unauthorized. This is an appeal from ALJ Pamela J. Fuller’s decision ordering authorized medical treatment and payment of medical bills.

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<sup>1</sup> K.S.A. 44-510(a).

<sup>2</sup> K.S.A. 2006 Supp. 44-508(g).

<sup>3</sup> K.S.A. 2006 Supp. 44-501(a).

<sup>4</sup> *Harris v. Bethany Medical Center*, 21 Kan. App. 2d 804, 909 P.2d 657 (1995).

<sup>5</sup> See K.S.A. 44-520.

At this juncture of the proceeding, the Board does not have jurisdiction to review those issues. K.S.A. 44-534a restricts the jurisdiction of the Board to consider appeals from preliminary hearing orders to the following issues:

- (1) Whether the employee suffered an accidental injury;
- (2) Whether the injury arose out of and in the course of the employee's employment;
- (3) Whether notice is given or claim timely made;
- (4) Whether certain defenses apply.

These issues are considered jurisdictional and subject to review by the Board upon appeals from preliminary hearing orders. The Board can also review a preliminary hearing order entered by an ALJ if it is alleged the ALJ exceeded his or her jurisdiction in granting or denying the relief requested.<sup>6</sup>

K.S.A. 44-534a grants authority to an ALJ to decide issues concerning the furnishing of medical treatment and the payment of medical compensation. The preliminary hearing statute found at K.S.A. 44-534a gives the ALJ authority to grant or deny the request for medical compensation pending a full hearing on the claim. Accordingly, the issue of whether the ALJ erred by ordering authorized medical treatment and medical bills to be paid by respondent is not subject to review under the preliminary hearing statute, K.S.A. 44-534a. In addition, the issue is not subject to review under K.S.A. 44-551(i)(2)(A), which permits review of preliminary orders that exceed an ALJ's authority. Thus, the ALJ did not exceed her jurisdiction and the Board does not have jurisdiction to review the Judge's preliminary findings regarding medical compensation.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>7</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>8</sup>

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<sup>6</sup> See K.S.A. 2006 Supp. 44-551.

<sup>7</sup> K.S.A. 44-534a.

<sup>8</sup> K.S.A. 2006 Supp. 44-555c(k).

**AWARD**

**WHEREFORE**, it is the finding of this Board Member that the Order For Medical Treatment of Administrative Law Judge Pamela J. Fuller dated January 9, 2007, finding claimant suffered accidental injury arising out of and in the course of her employment and provided timely notice is affirmed. The respondent's appeal of the ordered payment of medical bills and authorized medical treatment is dismissed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of March 2007.

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BOARD MEMBER

c: Bruce A. Brumley, Attorney for Claimant  
Matthew J. Schaefer, Attorney for Respondent and its Insurance Carrier  
Pamela J. Fuller, Administrative Law Judge